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NO. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,
Petitioner,

v.

MAURICE SHACKET AND SYLVIA SHACKET,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AIRCRAFT FINANCE ASSOCIATION

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QUESTIONS PRESENTED

Amicus curiae Aircraft Finance Association respectfully adopts the "Questions Presented" set forth in the Petition for Writ of Certiorari granted by this Honorable Court on December 6, 1982:

> By enacting 49 U.S.C. §1403 (Section 503 of the Federal Aviation Act of 1958), requiring recordation of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit conveyance of title to aircraft by transfer of possession alone, without FAA recording?

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BRIEF AMICUS CURIAE OF THE AIRCRAFT FINANCE ASSOCIATION

The Aircraft Finance Association, with the consent of the parties and pursuant to Rule 36.2, Rules of the Supreme Court of the United States, respectfully submits this brief as *Amicus Curiae.*

INTEREST OF THE AMICUS CURIAE

This brief is filed because the *amicus* has a vital interest in the issues presented in this case as they relate to the validity and effect of conveyances or instruments required to be filed with the Federal Aviation Administration (FAA) Aircraft Registry for recording pursuant to Section 503 of the Federal Aviation Act of 1958 (the Act).[1] More specifically, the interest of the *amicus* is in the effect which a failure to record such instruments or conveyances has on the rights of third parties who may acquire or who may hold other interests in such aircraft.

The Aircraft Finance Association (AFA) is incorporated in the State of Texas as a non-profit trade association The membership of the association is comprised of full members which are banks, financial institutions, and lenders actively and regularly engaged in financing the purchase of aircraft, and of associate members who participate in such transactions on behalf of such entities as title search companies, insurers and attorneys.

The membership of the AFA includes most of the major lenders throughout the United States specializing in or having a substantial interest in financing of new and used aircraft. The total dollar volume of aircraft financed by the members of the AFA constitutes a substantial, if not major, share of the total dollar volume of aircraft financed in the United States. Even more importantly, the members of the AFA regularly and daily conduct a similarly substantial, if not major, portion of the transactions recorded in the FAA Aircraft Registry and of the transactions conducted in reliance upon the records

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[1] 49 U.S.C. §1301 *et seq.*

maintained by the FAA Aircraft Registry.[2]

It is essential to all persons interested in aircraft and to the AFA members and the customers and public that they serve, that the integrity and reliability of the FAA Aircraft Registry be maintained, as the documents and conveyances recorded by the Aircraft Registry are relied upon and must be relied upon before any informed decision can be made regarding the status of interests in any particular aircraft.[3]

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[2] The FAA Aircraft Registry currently maintains records relating to approximately 279,000 aircraft, of which files approximately 200,000 are active at the present time.

The FAA Aircraft Registry annually receives 300,000 applications for aircraft registration and recordation of conveyances and other instruments relating to interests in aircraft. Of these applications, the FAA receives 95,352 bills of sale annually; 115,368 security agreements annually; 80,160 applications for aircraft registration annually; and the remainder of such filings relate to other miscellaneous documents including lien releases.

Even more significantly, the FAA Aircraft Registry receives 600,000 inquiries annually regarding the status of aircraft, and each year 190,000 aircraft files are checked out and physically reviewed and inspected by aircraft title search companies and other interested persons to determine the status of any interests relating to particular aircraft.

[3] *Amicus* AFA respectfully points out that the FAA aircraft recordation system does not issue or record documents entitled "certificates of title" to aircraft and that there are no "certificates of title" to aircraft as would be the case with motor vehicles and other similar classes of property. Instead, ownership of aircraft is determined by the chain of conveyances and other instruments affecting interests in aircraft recorded in the FAA Aircraft Registry. Thus, insofar as the parties to this case may refer to "title" or "certificate of title," the Court should be aware that formal "title" documents such as might provide actual notice to a subsequent purchaser or other interested party of any prior recorded or unrecorded transfer, assignment or lien on an aircraft, are not utilized with respect to conveyances or other interests in aircraft, and that the *only* method of determining ownership and interests in aircraft is an examination of the chain of conveyances and records maintained with regard to such aircraft in the FAA Aircraft Registry.

If a situation is created in which unrecorded interests may have priority as against the recorded interests of innocent third persons, then hidden or secret interests in aircraft would be fostered and given effect. This in turn would jeopardize and impair the overall integrity, reliability and effectiveness of the Aircraft Registry.

Such a chaotic situation would be further compounded by the fact that any third parties thereafter acquiring any interest in an aircraft would do so at their own peril. This result would be fundamentally inconsistent with the objectives to be served by providing a single federal recording system for interests in aircraft, and therefore should not be permitted to develop. The preemptive nature of Section 503 of the Act must be preserved with regard to the validity of recorded interests vis-a-vis unrecorded interests.

This *amicus* fully recognizes that Section 503 has given rise to other preemption and priority issues, and in particular to issues relating to the effect under Section 503(d) of recording (as opposed to the effect under Section 503(c) of non-recording) on the preemption of the buyer in the ordinary course of business doctrine under U.C.C. §9-307. Such other issues are not involved in this case, and this *amicus* accordingly does not address such unrelated issues in its main argument herein.

At the risk of repetition, we again state that it is the opinion of the *amicus* that the issue of preemption and priorities and any potential conflict between Section 503(d) of the Act and U.C.C. §9-307, are not issues before the Court in this case. This *amicus* therefore reserves comment concerning such other preemption issues involving Section 503(d) of the Act and U.C.C. §9-307 until such time as those issues are specifically accepted

by the Court for decision.[4]

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[4] *Amicus* understands that a Petition For Writ of Certiorari has been filed in the 1982 October Term in a case entitled General Dynamics Corporation, Petitioner v. Gary Aircraft Corporation, Respondent, Case No. 82-777, which does involve such other issues.

This *amicus* further believes that these other issues as to the effect of recording under §503(d), as presented in the *General Dynamics Corporation v. Gary Aircraft* case, are likewise of vital significance and importance, and *amicus* encourages the Court to grant certiorari in that case as well. This Court has never ruled on such issues relating to the effect of recording under §503(d) of the Federal Aviation Act, and there is substantial conflict and confusion regarding these other issues which can be resolved only by this Court upon full consideration of all of such issues *and the presentation of argument by all interested parties. Compare, e.g.*, Sanders v. M.D. Aircraft Sales, Inc., 575 F.2d 1086 (3d Cir. 1978), and Haynes v. General Electric Credit Corp., 583 F.2d 869 (4th Cir. 1978), with Dowell v. Beech Acceptance Corp., Inc., 3 Cal. 3d 544, 476 P.2d 401 (1971), and O'Neill v. Barnett Bank of Jacksonville, 360 So.2d 150 (Fla. App. 1978).

In part, the problems arising from such conflict and the resulting confusion concerning such other issues, are illustrated by the Seventh Circuit decision in this case presently before the Court. The Seventh Circuit decision, in the opinion of the *amicus*, is to a great extent the result of the extension and application of rather far-reaching language and dicta contained in many of the prior decisions and commentary relating to the effect of recording (as opposed to effect of non-recording) interests in aircraft under the Federal Aviation Act. As the present case illustrates, such broad and far-reaching language if taken to its logical extreme ultimately results in conflicts with the express language of the Act itself.

It is respectfully submitted that the present case demonstrates the need for direction in the construction and application of this federal statute, which direction ultimately can be provided on these issues of federal law only by this Court. Such issues relating to the effect of recording (as opposed to the effect of non-recording) *are directly raised* in General Dynamics Corp. v. Gary Aircraft Corp., Case No. 82-777.

SUMMARY OF THE ARGUMENT

Section 503(c) of the Federal Aviation Act of 1958 does and should provide the rule for determining the effect of a *failure* to record conveyances or instruments affecting interests in aircraft on the validity of such unrecorded conveyances and instruments as to other parties holding or acquiring interests in such aircraft.

Section 503 of the Act establishes a federal recording system for conveyances and other instruments affecting interests in aircraft, and Section 503 is essentially unchanged since first enacted as Section 503 of the Civil Aeronautics Act of 1938.

The federal objectives in establishing such a central federal recording system for interests in aircraft include not only providing a central nationwide procedure and place for recording such interests, but also providing a central record from which prospective purchasers, lenders and other interested parties can determine any outstanding conveyances or other such interests in any United States registered aircraft. The federal interest in achieving such objectives arises first from the view of Congress that state recording systems and laws are inadequate to provide a practical basis for protecting and determining interests in aircraft, and that such a federal system is therefore essential to the promotion of air commerce. Secondly, such federal interest also arises from the treaty obligations undertaken by the United States to provide and to maintain a single central recording system to determine ownership and interests in United States registered aircraft.

In order to achieve the foregoing objectives, Section 503(c) of the Act provides that as to conveyances and instruments required to be recorded under federal law,

such conveyances and instruments shall not be valid, except as to the giver or maker of such conveyance or instrument and parties having "actual notice" of such conveyance or instrument, unless and until so recorded. It is respectfully submitted that the straightforward and predictable application of Section 503(c) is fundamental and essential to the fulfillment of the federal objective of creating a central federal recording system for interests in aircraft and for protecting persons acting in reliance upon such recording system from hidden or secret prior unrecorded interests in aircraft.

It is further submitted that the decision of the Seventh Circuit Court of Appeals completely failed to consider the application of Section 503(c) of the Act and in so doing is the only federal decision attempting to apply state law, as opposed to the express language of Section 503(c), to determine the effect of a failure to record a conveyance or instrument required to be recorded under the Act, on the rights of third parties holding or acquiring other interests in such aircraft.

Amicus AFA also points out that Section 503(c) includes an exception to the foregoing general rule, which exception is intended to avoid injustice in appropriate cases by denying the protection of the federal recording requirement to persons having "actual notice" of such unrecorded conveyances or instruments. *Amicus* AFA expresses no opinion as to the possible application of such exception to the facts of this case, inasmuch as the lender is not a party to this appeal. *Amicus* AFA therefore leaves such issue to the parties for any further development in this case.

For the foregoing reasons, *Amicus* AFA respectfully submits that the decision of the Seventh Circuit Court of

Appeals in this case should be reversed to the extent that it applied state law and failed to apply Section 503(c) of the Federal Aviation Act to determine the effect of the failure to record the conveyance to the Shackets in this case on the validity of such conveyance as to third persons such as Philko Aviation, Inc. *Amicus* AFA further respectfully submits that such issue should be decided solely on the basis of the straightforward and predictable application of Section 503(c) of the Federal Act of 1958 to this case.

ARGUMENT

I. THE FEDERAL AVIATION ACT OF 1958 DOES AND SHOULD PROVIDE THE RULE FOR DETERMINING THE LEGAL EFFECT OF A FAILURE TO RECORD CONVEYANCES AND INTERESTS IN AIRCRAFT AND FOR DETERMINING THE VALIDITY OF SUCH UNRECORDED CONVEYANCES AND INTERESTS AS TO OTHER PERSONS HAVING OR ACQUIRING INTERESTS IN SUCH AIRCRAFT.

A. THE AIRCRAFT RECORDATION PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958 EXPRESSLY REQUIRE RECORDING OF CONVEYANCES AND OTHER INSTRUMENTS AFFECTING INTERESTS IN AIRCRAFT AND SECTION 503(c) EXPRESSLY PROVIDES THAT SUCH DOCUMENTS SHALL NOT BE VALID, EXCEPT AS TO CERTAIN OF THE PARTIES TO THE TRANSACTION AND PERSONS HAVING ACTUAL NOTICE OF THE TRANSACTION, UNLESS AND UNTIL SO RECORDED.

The Federal Aviation Act of 1958 provides a central federal recording system for the filing of conveyances

and instruments affecting interests in aircraft. Sections 503(a) and (b) of the Act expressly read as follows:

RECORDATION OF AIRCRAFT OWNERSHIP
ESTABLISHMENT OF RECORDING SYSTEM

SEC. 503. [72 Stat. 772, as amended by 73 Stat. 180, 78 Stat. 236, 49 U.S.C. 1403] (a) The Secretary of Transportation shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereto or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604(b) of this Act for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances,

and locations thereof; and also any assignment or amendment thereof or supplement thereto.

RECORDING OF RELEASES

(b) The Secretary of Transportation shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

49 U.S.C. §1403(a) and (b).

The current aircraft recording system is essentially unchanged from the federal aircraft recording system first established by Congress under the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, §503, 52 Stat. 973, 1006 (1938), and such federal aircraft recording system was intended to meet the need for a central recording system relating to ownership and interests in aircraft.

At the present time, such central recording system specifically fulfills at least three objectives directly involved in this case:

(1) Providing a central recording registry so that owners, purchasers and financers of aircraft, in order to protect their legal and equitable interests, are not obligated to record their interests in aircraft in each state and county in which the aircraft from day to day might be located;

(2) Providing prospective purchasers, financers and investors with a central record of all interests in and to United States registered aircraft for the purpose of determining ownership and interests in such aircraft; and

(3) Providing a central record of ownership and interests in United States registered aircraft in order to comply with the obligations of the United States arising under the Convention on the International Recognition of Rights in Aircraft (the Mortgage

Convention), and other international agreements.

In addition to these objectives, the federal statute, and particularly Section 503(d), 49 U.S.C. §1403(d), entitled Effect of Recording, also provides a federal rule for determining the effect of recording interests in aircraft. However, the issue presented in this case does not require an examination of the priority effect under Section 503(d) of recording under the federal system. Instead, the issue in this case involves the effect under Section 503(c) of a *failure to record* under the federal system—the so-called "negative" effect of the statute.

Another objective of the federal statute is the creation of a *federal* "choice of law" rule with regard to the law to be applied to determine the underlying or inherent validity of any conveyances and instruments involved in an aircraft transaction. 49 U.S.C. §1406. As set forth in the legislative history:

> The bill . . . create[s] *a uniform Federal rule* which would provide that the *validity of certain instruments* affecting title to or interest in aircraft shall be governed by the laws of the State, District of Columbia, territory, or possession in which they are delivered.

S. Rep. No. 1060, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News 2319-26.

Such federal "choice of law" rule is not involved in this case because such rule does not in any way obviate or eliminate the further federal requirement that such conveyance or instrument (even if it is valid as between the parties under the applicable state law under 49 U.S.C. §1406) must still be recorded under Section 503 of the Federal Aviation Act before it will have any validity *as against third persons other than persons having actual notice of the transaction*. As will be discussed further, the issue

in this case is precisely whether, under federal law, the unrecorded conveyance to the Shackets in this case is valid *as to certain third persons* to the transaction, even assuming that it might have been inherently valid as between the parties to the transaction, Smith Aircraft Sales and the Shackets, under the applicable state law under 49 U.S.C. §1406.

Returning to the objectives of the federal recording system involved in this case, a basic and fundamental requirement of such a central recording system for determining ownership and interests in aircraft is that *all* conveyances and instruments *must* be filed for recording in such systems. In order to achieve this requirement, Section 503(c) of the Federal Aviation Act of 1958 provides that such conveyances and instruments shall not be valid, except as to the person by whom the conveyance or instrument is made or given, and as to persons with "actual notice" thereof, unless and until such conveyance or instrument is recorded.

Section 503(c) of the Federal Aviation Act of 1958 expressly reads in pertinent part as follows:

CONVEYANCES TO BE RECORDED

> (c) No conveyance or instrument the recording of which is provided by section 503(a) shall be valid in respect to such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.

49 U.S.C. §1403(c).

The legislative history of Section 503(c) of the Civil Aeronautics Act of 1938 demonstrates the federal interest in providing a federal recording system in which interested parties would be able to determine the status of ownership and interests in aircraft. The object of Section 503(c) was described by one of the drafters of the House Resolution 9738, 75th Congress, who testified in 1938 as follows:

> At the present time and for the past ten years there has been an attempt to record the title or ownership of aircraft in the United States that are owned by citizens of the United States; but such recording has been solely for purposes of determining the nationality of the aircraft. In other words, that has been a step which was provided in the law for licensing of the aircraft under the provisions of the 1926 law.
>
> That has long been felt to be unsatisfactory and particularly when the Reconstruction Finance Corporation began to make loans, they felt there should be some protection, and many private owners have long felt that there should be some agency of the Government wherein any interest in aircraft could be recorded for their own protection because the buyer of a private airplane is up against a problem far worse than that of the purchaser, let us say, of an automobile, because aircraft can be moved so rapidly from state to state that state recording laws in their individual differences have worked a hardship on the buyer rather than really aiding him.
>
> One step in that direction would be, of course, to have a uniform state law; but the possibilities of getting that at any early date seemed to be somewhat remote and with that thought in mind, it has been suggested that the Federal Government serve that end by setting up a title recording agency within the civil aeronautics authority.

Hearings before the Committee on Interstate and Foreign Commerce. H.R. 9738, 75th Cong., 3rd Sess. 405-06 (1938).

Section 503(c) of House Resolution 9738 was thereafter adopted by the House-Senate Conference Committee in its conference report, and the purpose of such section was reported to be the following:

> Section 503. Recording of transfer of aircraft ownership: This section *requires the recordation* with the authority *of every transfer* made after the effective date of the section, *of any interest* in a civil aircraft of the United States. *The conveyance evidencing each such transfer is to be recorded with an index in a recording system to be established by the Authority.*

Conference Committee Report on S. 3845 and H.R. 9738, 75th Cong., 3d Sess. 8864 (1938).

As set forth above, the clear intent of Congress in enacting Section 503(c) of the Civil Aeronautics Act of 1938 was not only to establish a central national (federal) recording procedure for purchasers, but also to provide such a central national (federal) record in which parties interested in ownership of aircraft could review *every transfer of any interest* in a particular aircraft. Such federal interest and objective have been carried forward in essentially the same form in Section 503(c) of the Federal Aviation Act of 1958, and the integrity and reliability of the system established thereby is as vital and important to air commerce today as it was in 1938.

Accordingly, an examination of the Act as a whole and particularly the express language of Section 503(c) of the Federal Aviation Act and its legislative history, clearly establishes that conveyances and instruments affecting interests in aircraft (regardless of their underlying validity

under state law) shall *not* be valid as against persons other than certain of the parties to the transaction and persons having "actual notice" of such transaction, unless and until such documents are filed for recording under the Federal Aviation Act.

B. THE MAJORITY OF PRIOR DECISIONS RELATING TO THE EFFECT OF A FAILURE TO RECORD A CONVEYANCE OR INSTRUMENT AFFECTING INTERESTS IN AIRCRAFT HAVE APPLIED SECTION 503(c) OF FEDERAL AVIATION ACT IN A STRAIGHTFORWARD AND PREDICTABLE MANNER AND THE DECISIONS BELOW IN THIS CASE ARE THE FIRST AND ONLY FEDERAL DECISIONS THAT FAIL TO HOLD THAT THE FEDERAL AVIATION ACT PREEMPTS STATE LAW AS TO THE EFFECT OF A FAILURE TO RECORD SUCH CONVEYANCES AND INSTRUMENTS.

As a general rule and subject to the exceptions to be discussed below, the application of the provisions of Section 503(c) of the Act to the effect of a failure to record interests in aircraft has been straightforward and predictable: Unrecorded earlier interests have not been given priority over subsequent interests created prior to recording of the earlier unrecorded interests.[5] *Aircraft Invest-*

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[5] Obviously, in determining ownership to aircraft as between the parties to a transaction, federal recording of instruments relating to the transaction clearly is not a prerequisite to a valid and binding sale or encumbrance as between the parties. Norris v. Insurance Company of North America, 26 N.C. App. 91, 215 S.E.2d 379 (1975); Smith v. Joliet Airmotive, Inc., 35 Ill. App.2d 2, 181 N.E.2d 817 (1962); Bishop v. R. S. Evans, East Point, Inc., 80 Ga. App. 324, 56 S.E.2d 134 (1949).

Further, in determining ownership to aircraft as between the holder of an unrecorded interest and a holder of a subsequent interest

ment Corp. v. Pezzani & Reid Equipment Co., 205 F.Supp. 80 (E.D. Mich. 1962); *Marsden v. Southern Flight Service, Inc.*, 227 F.Supp. 411 (M.D.N.C. 1961); *American Aviation, Inc. v. Aviation Insurance Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544 (1968); *Pope v. National Aero Finance Co.*, 236 Cal. App.2d 722, 46 Cal. Rptr. 233 (1965); *McCausland v. Davis*, 204 So.2d 334 (Fla. 1967); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 476 (1949); *Marrs v. Barbeau*, 336 Mass. 416, 146 N.E.2d 353 (1957).

The decisions of the lower courts in this case, *Shacket v. Roger Smith Aircraft Sales, Inc.*, 497 F.Supp. 1262 (N.D. Ill. 1980), and *Philko Aviation, Inc. v. Shacket*, 681 F.2d 506 (7th Cir. 1982), are the only federal decisions found which have held that the effect of a failure to record pursuant to Section 503 of the Act is not to be determined by

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having "actual notice" of the earlier unrecorded interest, the failure to record the earlier interest does not give priority to the subsequent interest. Marsden v. Southern Flight Services, Inc., 227 F.Supp. 411 (D.N.C. 1961); Aircraft Investment Corp. v. Fisher Flying Service, Inc., 183 So.2d 441 (La. App. 1966). These cases also have held that "actual notice" is not only actual knowledge of the prior unrecorded interest, but also includes knowledge of facts which provoke inquiry into the possibility of such an interest or into the transactions out of which the interest arises.

Finally, the foregoing rules also have been applied to the holders of judgment liens, attachment liens, and tax liens, such that the holders of such *non-consensual* liens, who have not acquired such liens as *bona fide* purchasers *for value* in reliance upon the Federal recording system, generally acquire liens in the aircraft only to the extent of the interest of the judgment or attachment debtor or taxpayer. Thus, if the judgment or attachment debtor or taxpayer was a party to an earlier unrecorded transaction or had actual notice of an earlier unrecorded transaction, then such judgment, attachment and tax liens also may be subordinate to such unrecorded interest. CIM International v. United States, 641 F.2d 971 (9th Cir. 1980); Marshall v. Bardin, 169 Kan. 534, 220 P.2d 187 (1950). *But see* Wilson v. Barnes, 221 S.W.2d 731 (Mo. 1949). Such rule also may provide an alternative basis for the decision in Sun Bank v. Snell (In re Cone), 11 B.R. 925 (M.D. Fla. 1981).

federal law, and such decisions are in direct conflict with all other federal cases found which have considered such issue. The only other decision found which follows a state rule as to the effect of a failure to record is *Lochhead v. G.A.C. Finance Corp. of Camelback*, 6 Ariz.App. 539, 434 (1968).

Instead of applying Section 503(c) in a straightforward and predictable manner, the *Shacket* and *Lochhead* decisions have attempted to apply broad statements regarding the scope of federal preemption arising under federal aircraft recording law from other cases involving the effect of recording interests in aircraft under Section 503(d), as opposed to the effect of *not recording* or *failing* to record interests in aircraft under Section 503(c). *See Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3d Cir. 1978); *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App.3d 1, 401 N.E.2d 1340 (1980); *Haynes v. General Electric Credit Corp.*, 582 F.2d 869 (4th Cir. 1978); *State Securities Co. v. Aviation Enterprises*, 355 F.2d 225 (10th Cir. 1968); *Northern Illinois Corp. v. Bishop Distributing Co.*, 284 F.Supp. 121 (D.Mich. 1968).

Applying such broad language to the interpretation and application of Section 503(c) relating to a *failure* to record, and giving priority to unrecorded interests creates the problem of "hidden" or "secret" interests in aircraft. Such "hidden" or "secret" interests are fundamentally incompatible with the basic objectives of the central federal aircraft recording system for interests in aircraft. Further, the application of such broad statements to give validity and effect to such interests results in a direct conflict with the express language of Section 503(c) of the Federal Aviation Act.

The application of a federal rule to determine the effect

of a failure to record also has been uniformly acknowledged by the legal commentators on the Federal Aviation Act and its predecessors. H. C. Sigman, *The Wild Blue Yonder: Interests in Aircraft Under Our Federal System*, 46 U.C.L.A. L.Rev. 316, 354-57 (1973); M. Scott, *Liens in Aircraft: Priorities*, 25 J. Air L. 193, 200-05 (1958); Note, *Taking The Lender For A Ride: Section 1403 Of The Federal Aviation Act And The Buyer In The Ordinary Course Of Business*, 36 Wash. and Lee L.Rev. 205, 212-13 (1979). While these commentators have not always advocated a broad rule of federal preemption, they nevertheless have recognized that in the case of a failure to record (such as involved here), Section 503(c) of the Federal Aviation Act does provide the rule of decision to be applied in disputes with subsequent purchasers without notice.

In summary, the clear majority of cases considering the effect of a *failure* to record a conveyance or instrument affecting an interest in aircraft have decided such issue under the express language of Section 503(c) of the Federal Aviation Act. Moreover, even the commentators on the federal aircraft recording system, while not uniformly in favor of a broad rule of absolute federal preemption, have recognized that as to a *failure* to record, Section 503(c) of the Federal Aviation Act itself provides the rule of decision and that the Act therefore preempts state law with regard to such "failure to record" issues.

C. THE FEDERAL OBJECTIVES OF SECTION 503 OF THE FEDERAL AVIATION ACT AND THE EFFECTIVENESS OF THE FEDERAL AIRCRAFT RECORDATION SYSTEM REQUIRE THAT AS A GENERAL RULE INNOCENT PURCHASERS AND HOLDERS OF INTERESTS IN AIRCRAFT BE PROTECTED UNDER FEDERAL LAW FROM HIDDEN OR SECRET UNRECORDED INTERESTS IN SUCH AIRCRAFT.

As previously stated in the Interest of the Amicus, it is vital to parties involved in aircraft transactions that the integrity of the FAA Aircraft Registry be maintained as a reliable and effective basis for commercial and financial transactions involving aircraft. The fundamental objectives of the federal recording system require not only that such system provide the exclusive national procedure and place for recording interests in aircraft, but also that all such interests in aircraft be so recorded in order fully to apprise other interested persons or parties of all outstanding interests in aircraft.

Each year approximately 190,000 federal aircraft files are physically examined and inspected in regard to aircraft transactions. Obviously, any possibility that "hidden" or "secret" unrecorded interests might be valid as against subsequent purchasers or lenders without actual notice who have relied upon the records maintained by the FAA Registry would severely and substantially impair the reliability and certainty afforded purchasers and financers of aircraft by such federal records.

It should also be noted that the FAA Registry provides the only basis or source records for determining interests in aircraft which have been increasing steadily in value and sophistication. It is not now unusual for business aircraft to be valued in excess of several millions

of dollars, and for transport aircraft to be valued at more than one hundred (100) million dollars, and for the financing of such aircraft to be extremely complex and sophisticated involving the interests of many parties. As a practical and legal matter, purchasers and financers of such aircraft require a high degree of certainty and reliability in undertaking such substantial and complex investments.

For these reasons, it is fundamental and essential that the express language of Section 503(c) of the Federal Aviation Act, which provides that unrecorded interests in aircraft shall not be valid, except as to certain parties to the transactions and others having actual notice of such interests, be given its full and intended effect in order to preserve the reliability and certainty provided in commercial and financial transactions by the FAA Registry.

II. INTERNATIONAL CONVENTIONS ALSO REQUIRE A SINGLE FEDERAL RECORDING SYSTEM TO DETERMINE RIGHTS IN UNITED STATES REGISTERED AIRCRAFT.

The United States has entered into two separate international conventions whereby the United States has agreed with other nations to establish central aviation registries, and further, to recognize reciprocally the rights in the national aviation registries of the other contracting nations.

On December 7, 1944, the Convention on International Civil Aviation (the Chicago Convention) was signed. It was subsequently ratified by the United States on August 9, 1946. In the Chicago Convention, the 143 signatory nations committed themselves to establish national aviation registries so that each of the nations would have a ready reference, located in a single identifiable

place, for the determination of rights in aircraft:

> Chapter III. Nationality of Aircraft . . .
>
> Article 21. Report of Regulations. Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States.

Chapter III, Article 21, *Convention on International Civil Aviation*, (the Chicago Convention), December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

To implement the undertakings of the Chicago Convention, the contracting nations again met in Geneva, Switzerland in 1948 and signed the Convention on the International Recognition of Rights in Aircraft (the Mortgage Convention). The purposes of this Convention were stated in the preamble:

> Whereas, the International Civil Aviation Conference, held at Chicago in November-December 1944 recommended the early adoption of a Convention dealing with the transfer of title to aircraft,
>
> Whereas, it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognized internationally,
>
> The undersigned, duly authorized, have agreed on

behalf of the respective Governments, as follows:

Convention on International Recognition of Rights in Aircraft (the Mortgage Convention), Geneva, June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847, 310 U.N.T.S. 151.

It is helpful at this juncture to consider the underlying objectives set forth in the preambles to both the Chicago Convention and the Mortgage Convention in relation to the objectives of federal supremacy over states of the United States regarding recordation of interests in aircraft. The entire structure established by the international conventions envisions a single registry in each of the contracting nations to which reference may be made to determine rights in aircraft registered under the nationality of that country. It is certainly not envisioned that an inquiry by the United States as to the registration of an aircraft of Swiss registry must be referred to each of the Cantons in Switzerland before an intelligent report on ownership could be made. Reciprocally, neither is it intended that a request to the United States would be referred from the Federal Registry at Oklahoma City to each of the individual fifty states or for that matter to check or verify the status of unspecified and unrecorded hidden or secret interests. Such a result would obviously make it impossible to fulfill the contracting nation's responsibilities. But, this would be the result if the conclusions reached by the opinion of the Seventh Circuit Court of Appeals were left to stand.

The Mortgage Convention obligates each of the 143 contracting nations to create and maintain a national registration of aircraft. To understand these obligations it is important to look at the following provisions of the

Mortgage Convention:

Article I

(1) The Contracting States undertake to recognize:

(a) rights of property in aircraft;

(b) rights to acquire aircraft by purchase coupled with possession of the aircraft;

(c) rights to possession of aircraft under leases of six months or more;

(d) mortages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

(i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality, at the time of their constitution, and

(ii) are regularly recorded in a public record of the Contracting State in which the aircraft was registered as to nationality. . . .

Article II

(1) *All recordings* relating to a given aircraft *must appear in the same record* . . .

Article III

(1) The address of the authority responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts of the particulars recorded. Such copies of extracts shall constitute prima facie evidence of the contents of the record.

(3) If the law of a Contracting State provides that the

filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.

Articles I, II and III, *Convention on International Recognition of Rights in Aircraft* (the Mortgage Convention), Geneva, June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847, 310 U.N.T.S. 151. (Emphasis added).

When reviewing the Mortgage Convention, it is evident that specific principles control the various covenants:

(1) The terminology "Contract State" refers to the signatory nation, and not to any component part, state, territory or political unit thereof.

(2) The signatory nations agree to recognize "mortgages, hypotheques, and similar rights in aircraft which are contractually created as security for payment of an indebtedness," and which are not generally accompanied by possession of the aircraft.

(3) Where these Articles speak to the

(a) "law of the Contracting State," or

(b) "a public record of the Contracting State," or

(c) "The regularity of successive recordings in different Contracting States,"

they are addressing national, federal governments, signatories to the conventions, and not separate, independent units of such signatories.

The Mortgage Convention is further explicit in requiring that "*All recordings* relating to a given aircraft must appear *in the same record.*" Article II, Section (1).

To put this matter in proper prospective, it is evident that the United States of America has obligated itself

vis-a-vis other governments to maintain a central national aircraft registry for the recordation of interests in aircraft. Further, this national registry must of necessity be preemptive vis-a-vis the fifty (50) individual states with regard to the recordation of such interests. This in turn does not envision the validity of unrecorded instruments as to foreign and domestic third parties without actual notice unless and until such instruments are properly recorded in the appropriate national registry.

III. DEPENDING ON THE FACTS OF THIS CASE, THE "ACTUAL NOTICE" EXCEPTION OF SECTION 503(c) OF THE ACT MAY BE APPLICABLE.

A. SECTION 503(c) OF THE FEDERAL AVIATION ACT PROVIDES THE BASIS FOR AVOIDING INJUSTICE IN APPROPRIATE CASES BY AFFORDING THE PROTECTION OF THE FEDERAL RECORDING SYSTEM ONLY TO PERSONS WITHOUT ACTUAL NOTICE OF UNRECORDED INTERESTS.

Section 503(c) of the Federal Aviation Act provides the basis for avoiding injustice in appropriate cases by affording the protection of the federal recording system only to persons without "actual notice" of unrecorded interests. Section 503(c) of the Act provides as follows:

> No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, . . . against any person *other than* the person by whom the conveyance or other instrument is made or given, . . . or *any person having actual notice thereof* . . . 49 U.S.C. §1403(c).

49 U.S.C. §1403(c). (Emphasis added).

As a result, in determining priority of interests in an

aircraft as between the holder of an unrecorded interest and the holder of a subsequent recorded interest, the unrecorded interest may nevertheless take priority over the recorded interest where the holder of such recorded interest may have had "actual notice" of the unrecorded interest. *Marsden v. Southern Flight Services, Inc.*, 227 F.Supp. 411 (D.N.C. 1961); *Aircraft Investment Corp. v. Pezzani & Reid Equipment Co.*, 205 F.Supp. 80 (E.D. Mich. 1962); *Aircraft Investment Corp. v. Fisher Flying Service, Inc.*, 183 So.2d 441 (La. App. 1966). These cases have also held that "actual notice" is not only actual knowledge of the prior unrecorded interest, but also includes knowledge of facts which should provoke inquiry into the possibility of such an interest or into the transaction out of which the interest arose.[4]

B. AMICUS AIRCRAFT FINANCE ASSOCIATION TAKES NO POSITION AS TO THE APPLICATION OF THE "ACTUAL NOTICE" EXCEPTION TO THE PARTIES ON APPEAL AND BASED ON THE RECORD IN THIS CASE.

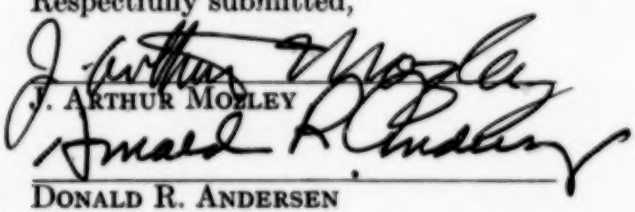
The *Amicus* does not take any position as to the application of the "actual notice" exceptions to this case inasmuch as the lender is not a party to this appeal, except to note that facts which might provide evidence of "actual notice" to a purchaser, would not under ordinary circumstances necessarily be evidence of "actual notice" to other third persons such as a lender. Whether such exception is otherwise applicable as between the parties on appeal in this case must be determined upon the facts and record herein.

[4] The cases on "actual notice" have afforded several specific, as well as general, examples of protection to unrecorded interests. Aircraft Investment Corp. v. Pezzani & Reid Equipment Co., 205 F. Supp. 80 (E.D. Mich. 1962).

CONCLUSION

For the foregoing reasons, *amicus curiae* Aircraft Finance Association respectfully submits that the decision of the Seventh Circuit Court of Appeals should be reversed to the extent that such decision fails to hold that Section 503(c) of the Federal Aviation Act preempts state law as to the effect of a *failure* to record a conveyance or instrument affecting an interest in aircraft, the recording of which is required under such statute. *Amicus curiae* Aircraft Finance Association respectfully submits that this Court should hold that Section 503(c) of the Federal Aviation Act provides the applicable rule of decision in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. ARTHUR MOZLEY, attorney of record for the Aircraft Finance Association and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of January, 1983, I served true and correct copies of the foregoing Brief *Amicus Curiae* of the Aircraft Finance Association upon the following attorneys of record for Philko Aviation, Inc. and Maurice Shacket and Sylvia Shacket pursuant to Supreme Court Rule 28, by depositing three (3) true and correct copies of the same in the United States Mail, correctly addressed and first-class postage prepaid, certified, return receipt requested:

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This 20th day of January, 1983.

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